1984

# State of Utah v. Claude A. Bundy : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

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| STATE OF UTAH, | : | |
| Plaintiff-Respondent, | : | |
| -v- | : | Case No. 19013 |
| CLAUDE A. BUNDY, | : | |
| Defendant-Appellant. | : | |

# BRIEF OF RESPONDENT

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APPEAL FROM CONVICTIONS OF RAPE, FOR VIOLATION OF UTAH CODE ANN. § 76-5-402 (1978), AND FORCIBLE SODOMY, FOR VIOLATION OF UTAH CODE ANN. § 76-5-403 (1978), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE DEAN E. CONDER, JUDGE, PRESIDING.

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BRIEF OF RESPONDENT

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## STATEMENT OF THE NATURE OF THE CASE

Appellant, Claude A. Bundy, appeals his convictions of rape, for violation of Utah Code Ann. § 76-5-402 (1978), and forcible sodomy, for violation of Utah Code Ann. § 76-5-403 (1978).

## DISPOSITION IN THE LOWER COURT

Appellant was found guilty of rape and forcible sodomy in a jury trial held December 9, 10, and 13, 1982 in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Dean E. Conder, Judge, presiding. On January 20, 1983 appellant was sentenced to serve five years to life in the Utah State Penitentiary for each count, the sentences to run concurrently.

## RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the convictions below.

## STATEMENT OF THE FACTS

In the spring of 1981 the victim, Sherry Christiansen, began babysitting her two young nieces, Tiffany and Kimberly, the children of appellant and Sherry's older sister Lori Bundy (T. 20-22, 25, 34, 170-172). Sherry was 12 years old at the time (T. 19). Sherry babysat her nieces on a regular basis through the end of 1981 (T. 22, 26, 35).

Appellant and his wife both worked. Appellant, a construction worker, worked swing shift and generally left for work at approximately 1:00 p.m., returning home between 11:30 p.m. and midnight (T. 27, 39). Lori Bundy worked nights at Zion's Mountain View Nursing Home as a nurses' aid, and she usually went to work between 9:30 and 10:00 p.m. and returned at approximately 7:30 a.m. the next day (T. 26, 38-39, 178).

Sherry generally arrived at the Bundys' apartment around noon to begin babysitting, and could go home after appellant returned from work, approximatley twelve hours later; however, Sherry regularly stayed overnight at the Bundys' apartment (T. 28, 37-38). Because Lori Bundy worked all night, when Sherry stayed overnight at the Bundys' apartment, she was alone with appellant and the two sleeping little girls (T. 26, 39).

During this period of 1981 when Sherry babysat her nieces, appellant induced her to engage in sexual intercourse

and acts of sodomy with him 25 to 30 times (T. 41, 64-67; R. 124). At trial Sherry described in detail two such incidents.

The first such incident described by Sherry at trial occurred at the end of June or the beginning of July, 1981 in appellant's apartment at approximately 12:30 a.m. after appellant had returned from work (T. 41).[1] Appellant undressed Sherry and had her lie down on his bed (T. 54-55). Appellant told her to open her legs, and then he placed his penis in her vagina (T. 56-57). A few minutes later appellant placed his tongue in Sherry's vagina, fondled her breasts, and then again placed his penis in her vagina (T. 60-61).

The second occasion described by Sherry at trial took place in Sherry's home during the Christmas holiday in 1981 (T.65). Appellant took Sherry into her bedroom and had her pull down her pants and lean over her bed. Appellant pulled down his pants, and approaching her from the rear, put his penis in her vagina (T. 66). This was the last time appellant engaged in sexual intercourse with Sherry (T. 65, 67).

At the time of trial, appellant and his wife Lori were involved in divorce proceedings initated by appellant (T. 88, 165-166, 179-181). Lori testified at trial pursuant to an agreement reached by the prosecutor and appellant's trial

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[1] This was not the first time appellant had induced Sherry to have sex with him. The first time had been in May or early June 1981 (T. 64-65).

counsel in a discussion with the court in chambers prior to her testimony (T. 75, 81). After Lori testified appellant moved for a mistrial, claiming that Lori could not testify against appellant despite counsel's consent because appellant had not personally consented (T. 74-82, 159). The court took the matter under advisement (T. 82, 159-160, 163).

At the close of the evidence, the jury found appellant guilty of rape and forcible sodomy (T. 219), and the court denied appellant's motion for mistrial (T. 220-221). Appellant then brought this appeal.

## ARGUMENT

### POINT I

APPELLANT'S WIFE WAS PROPERLY PERMITTED TO TESTIFY.

A. APPELLANT HAD NO ABSOLUTE PRIVILEGE AGAINST HIS WIFE'S TESTIMONY.

Appellant argues that the trial court improperly permitted his wife, Lori Bundy, to testify against him. Appellant contends that he had an absolute privilege against his wife's testimony under Utah Code Ann. § 78-24-8(1) (1953), which states: "A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent . . . ."

Section 78-24-8(1), though, under its own terms, is not an absolute privilege. The statute lists three specific exceptions to the application of the marital privilege, which

are not applicable in the instant case, and a general exception: ". . . where it is otherwise specially provided by . . ."

The Rules of Evidence provide otherwise. Rule 23 of the Rules of Evidence limits the privilege only to testimony concerning confidential communications between husband and wife during the marriage. Appellant's trial counsel agreed to allow Lori Bundy to testify when assured that her testimony would deal only with her and appellant's work schedules and not any confidential communications (T. 75-82). Significantly, although appellant moved for a mistrial based on his wife's testimony (T. 79), he did not formally object to her testimony, nor did he move to strike any statement made by her on the grounds that it concerned confidential communications.

Evidence Rule 23 was intended to modify Section 78-24-8(1), according to the Committee Note to Rule 23 in the 1971 edition of the Rules of Evidence as Adopted by the Supreme Court of Utah (see Appendix A). Thus, since Rule 23 controls, Lori's testifying was proper.

Furthermore, Rule 2 provides: "Except to the extent to which they may be relaxed by other procedural rule or statute applicable to the specific situation, these rules shall apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced" (Emphasis added). Since section 78-24-8(1) is more stringent than Rule 23, Rule 23 is controlling.

In addition, Rule 101, recently adopted by this Court, states that the Rules of Evidence are to govern proceedings in Utah courts, with certain exception under Rule 1101 not applicable here. The Committee Note to Rule 101 states: "Rule 101 adopts a general policy making the Rules of Evidence applicable in all instances in courts of the State including situations previously governed by statute, except to the extent that specific statutory provisions are expressly retained." (Emphasis added.) Moreover, the same Note expressly rejects the position of the Court in State v. Hansen, Utah, 588 P.2d 164 (1978) that statutory provisions of evidence law inconsistent with rules of evidence take precedence. Therefore, Rule 23 controls the question of marital privilege since the provisions of Section 78-24-8(1) have not been expressly retained, and since Lori Bundy's testimony did not concern confidential communications, such testimony was proper even without appellant's consent.

It is also important to note that the foundation of the marital privilege outlined in Section 78-24-8 has been severely undermined. The section is based on the premise that "there are particular relations in which it is the policy of the law to encourage confidence and preserve it inviolate." Id. The United States Supreme Court in Trammel v. United States, 445 U.S. 40 (1980), dealing with an accused's privilege against a spouse's testimony, noted that the marital privilege rule originally was based on the policy of preserving marital harmony, but reasoned that where one spouse

is willing to testify against the other in a criminal proceeding, "there is probably little in the way of marital harmony for the privilege to preserve." Id. at 52. The Court also recognized that the original legal underpinnings of the marital privilege rule -- whereby a woman was regarded as a chattel and had no separate legal identity -- had long since been removed in our modern society, so there remained no contemporary justification for the privilege. Thus, the Court concluded that a spouse may not be compelled to testify (cf. Utah Constitution, Art, I, § 12; Utah Code Ann. § 77-1-6 (1982)), but neither may a spouse be foreclosed from testifying. In other words, only the witness-spouse has the privilege; the defendant-spouse has no privilege.

Although Trammel dealt with a federal statute, the Court's rationale in Trammel is applicable to the instant case. Since Lori Bundy willingly testified against appellant, her husband, and since appellant had already initiated divorce proceedings (T. 88, 165-166, 179-181), allowing Lori's testimony was not contrary to the underlying policy of Section 78-24-8(1). Therefore, appellant's claimed privilege is without foundation.

Also significant is the fact that former Code Section 77-44-4 (1978), which was nearly identical to Section 78-24-8(1) except for its express application to criminal proceedings, was repealed by 1980 Utah Laws, ch. 15, § 1, indicating the legislature's intent to remove the privilege in criminal trials. This Court has held that its primary

responsibility is to give effect to the legislature's underlying intent. Millett v. Clark Clinic Corp., Utah, 609 P.2d 934 (1980).

This Court in State v. Brown, 14 Utah 2d 324, 384 P.2d 930 (1963), held that it was error for the prosecutor to comment on the failure of the defendant's wife to take the stand. In the instant case, however, appellant's wife voluntarily took the stand, and there was no statement, nor could there have been any statement, by the prosecutor which infringed on the witness-spouse's right to refuse to testify.

Therefore, since the voluntary testimony of appellant's wife did not concern confidential communications between her and appellant, it was in compliance with Evidence Rule 23, and the trial court did not err in permitting such testimony.

B. EVEN IF APPELLANT'S PRIVILEGE WAS ABSOLUTE, HE CONSENTED THROUGH COUNSEL TO HIS WIFE'S TESTIMONY.

Assuming arguendo that Section 78-24-8(1) controls the issue of marital privilege, appellant still cannot claim error because he agreed through counsel to his wife's testifying against him. Section 78-24-8(1) permits spousal testimony upon such consent.

Prior to Lori Bundy's taking the stand, appellant's trial counsel, the prosecutor, and the trial judge held an off-the-record discussion in chambers concerning her ability

to testify. Appellant was not present at this discussion (T. 75). Appellant's trial counsel agreed to allow Lori to take the stand and testify as to her and appellant's work schedules [illegible]. After her testimony, appellant moved for a mistrial, claiming that he had not personally consented to his wife's testifying against him (T. 75-76).

It is well settled that a client is bound by his attorney's actions, although an attorney may not waive or surrender a fundamental right of a client without the client's consent. State v. LePage, 102 Idaho 387, 630 P.2d 674, cert. denied, 454 U.S. 1057 (1981); Matter of Hatfield, 231 Kan. 427, 646 P.2d 481 (1982); State v. Collins, 133 Ariz. 20, 648 P.2d 135 (1982). Since under the rationale of Trammel, supra, appellant has no fundamental right to foreclose his wife from testifying, appellant is bound by his attorney's consent to Lori's testimony.

C. ANY ERROR IN PERMITTING THE TESTIMONY OF APPELLANT'S WIFE WAS HARMLESS.

Rule 61, Utah Rules of Civil Procedure, states:

> No error in either the admission or the exclusion of evidence,and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Furthermore, this Court in State v. Eaton, Utah, 569 P.2d 1114 (1977), set forth the following standard for determining whether an error is prejudical:

> . . . if the error is such as to justify a belief that it had a substantial adverse effect upon the defendant's right to a fair trial, in that there is a reasonable likelihood that in its absence there may have been a different result, then the error should not be regarded as harmless.

In the instant case, the testimony of appellant's wife was merely corroborative. The information elicited from her, as to her and appellant's work schedules and the babysitting arrangements made with the victim, was also brought out in the testimonies of Douglas Christiansen, the victim, and appellant. Thus, the alleged error could not have affected a substantial right of appellant's, if he ever had a substantial right in light of the rationale of Trammel, supra, nor is there a reasonable likelihood that absent Lori Bundy's testimony there may have been a different result. Therefore, any error was harmless.

## POINT II

NO IMPROPER OPINION TESTIMONY WAS ADMITTED INTO EVIDENCE AT TRIAL.

A. APPELLANT CANNOT CHALLENGE OFFICER SCOTT'S TESTIMONY BECAUSE APPELLANT RAISED NO OBJECTION AT TRIAL.

Officer Welby Scott, a detective with the West Valley City Police Department, testified at trial that he had received information that the victim, Sherry Christiansen, had been sexually abused by her father, Douglas Christiansen, but upon investigation Officer Scott determined that the accusation was "unfounded" (T. 149-151). Appellant did not object to this testimony at trial. Appellant now claims that such testimony was improper and prejudicial.

It is well settled in Utah that a party cannot raise an issue for the first time on appeal absent exceptional circumstances. Wagner v. Olsen, 25 Utah 2d 366, 482 P.2d 702 (1971); State v. Steggell, Utah, 660 P.2d 252 (1983).

Appellant in his brief alleges that there was a "family conspiracy" against him and that, therefore, the Court should review the evidence more closely (Appellant's Brief p.9). Aside from this bald assertion appellant provides no evidence of such conspiracy. Thus, appellant has failed to establish that there are exceptional circumstances which would warrant review of the challenged testimony by the Court.

B. OFFICER SCOTT'S TESTIMONY WAS PROPER.

Assuming arguendo that this issue is properly before the Court, Officer Scott's testimony was well within the scope contemplated by Rule 56, Utah Rules of Evidence, cited by appellant.

Officer Scott was not testifying as an expert, so opinion or inferences in his testimony are limited by subsection (1) of Rule 56 to those which "the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue."

Significantly, subsection (3) of the same rule states: "Unless the judge excludes the testimony he shall be deemed to have made the finding requisite to its admission." Since the trial court did not exclude the testimony, the trial judge must have determined that the testimony passed the test of subsection (1).

In any event, Officer Scott's testimony that the allegation against the victim's father was unfounded was both rationally based on his perception of his investigation of the allegation and helpful to a clear understanding of his testimony or to the determination of the substance of the allegation. Thus, Officer Scott's testimony complied with the requirements of Rule 56(1) and did not constitute improper opinion testimony.

## POINT III

APPELLANT HAS WAIVED HIS OBJECTION TO ANY ALLEGED DEFECT IN THE INFORMATION BY FAILING TO OBJECT THERETO BEFORE TRIAL.

Appellant in his Supplemental Brief claims that the information is fatally defective because it fails to state a specific date on which the offenses were committed. Appellant has not previously raised such objection.

Rule 12(b)(1), Utah Rules of Criminal Procedure, requires that any objection to the information be raised at least 5 days prior to trial, unless the objection is that the information fails to show jurisdiction in the court of to charge an offense. Subsection (d) of the same rule provides that failure to so object constitutes a waiver. See State v. Hall, Utah, 671 P.2d 201 (1983).

Where, as in the instant case, the defendant does not object to the information before or at trial, this waiver rule is analogous to the rule that a party cannot raise an issue for the first time on appeal. Wagner v. Olsen, supra; State v. Steggell, supra.

Appellant does not challenge the jurisdiction of the trial court; appellant claims only that the information, by failing to allege a specific date,[2] did not state with sufficient particularity the actual transaction on which the

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[2] The victim could recall only the general period of time, not the specific dates (T. 41, 63-65).

charges are based. Appellant contends that this alleged defect prejudicially impaired his ability to prepare a defense.

Appellant's own authorities refute this contention Rule 4(b), Utah Rules of Criminal Procedure, cited by appellant, states: "Such things as time, place, means, intent, manner, value and ownership need not be alleged unless necessary to charge the offense." (Emphasis added.) That same subsection requires only that the information "charge the offense for which the defendant is being prosecuted by using the name given to the offense by common law or by statute or by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge."

The information in the case at bar used the statutory names of the two offenses charged: rape and forcible sodomy. Thus, the information complied with the above statutory requirement and furthermore fulfilled the primary purpose of an information, which is, as stated by this Court in State ex. rel. Cannon v. Leary, Utah, 646 P.2d 727 (1982), "to put the defendant on notice of the charges leveled against him. "Id. at 731.

Appellant attempts to establish that the "time" element was necessary to charge the offense and so should have been alleged because, appellant claims, failure to allege the specific date prevented him from using the alibi defense. Appellant cites State v. Cooper, 114 Utah 531, 201 P.2d 764

(1949), in support of the proposition that the issue of time may be very important where defendant's defense is alibi. The Court noted in Cooper, however, that the defendant had not advanced the defense of alibi and so granted the defendant no relief on that basis.

In the instant case, appellant also did not raise the defense of alibi. Thus, he should likewise be granted no relief because of the information's failure to allege the precise time of the offense.

Moreover, this Court has stated: "It is therefore well established in this jurisdiction that where time is not of the essence of the crime the exact time is immaterial . . . ." State v. Distefano, 70 Utah 586, 262 P. 113, 116 (1927). Time is not the essence of rape or forcible sodomy, so the exact time is immaterial.

Therefore, the information's failure to allege a specific date on which the offenses were committed does not render it defective. The information adequately charged an offense, putting appellant on notice of the charges leveled against him. Thus, appellant's failure to object to this alleged defect at least 5 days before trial constitutes a waiver.

## POINT IV

THE VICTIM'S CONSENT OR LACK THEREOF IS NOT AT ISSUE SINCE SHE WAS UNDER 14 YEARS OF AGE.

Appellant in his Supplemental Brief argues that, despite statutory provisions to the contrary, the prosecutor is required to establish that the victim of rape and forcible sodomy did not consent to the sexual acts even where the victim is under 14 years of age. Based on this argument, appellant claims that the trial court erred in failing to discharge him at the end of the State's case-in-chief on the grounds that the State had not proved lack of consent.

However, Utah Code Ann. § 76-5-406(7)(1978) provides that certain sexual acts, including sexual intercourse and sodomy, are without consent of the victim where the victim is under 14 years of age, as was the victim in the instant case. Thus, consent was not at issue in the instant case. Appellant does not contest the sufficiency of the evidence as to the other elements of the crimes charged.

## CONCLUSION

The testimony of appellant' s wife was within the scope contemplated by Rule 23, Utah Rules of Evidence, which modifies the marital privilege claimed by appellant under Utah Code Ann. § 78-24-8(1). Even if Rule 23 did not modify the statute, appellant consented through counsel to his wife's

testifying against him. In any event, any error in permitting such testimony was harmless since it did not affect a substantial right of appellant nor was there a reasonable likelihood that absent the testimony of appellant's wife there would have been a different result in light of the fact that her testimony was merely corroborative and added nothing unique to the State's case.

Appellant cannot challenge Officer Scott's testimony or the information since he did not timely object to the alleged errors or defects connected therewith. Even so, appellant's objections are without merit. Finally, consent was not at issue at trial because the victim was under 14 years of age.

Therefore, the convictions below should be affirmed.

RESPECTFULLY submitted this 6 day of January 1984.

DAVID L. WILKINSON
Attorney General

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Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing brief to Edwin F. Guyon, attorney for defendant, 820 Newhouse Building, Ten Exchange Place, Salt Lake City, Utah 84114, this 6th day of January, 1984.

Kathleen Dugan Bellisbuiger

# APPENDIX A

This Appendix contains a photo copy of Rule 23 and accompanying Note as they appear in Carvel Harward's copy of the 1971 edition of the Utah Rules of Evidence. Mr. Harward is the Deputy Salt Lake County Attorney who prosecuted this case below. The handwritten annotations and underlining are Mr. Harward's.

Howard

# RULES OF EVIDENCE

As Adopted by

The Supreme Court of Utah

*

Effective July 1, 1971

or integrity or their opposites, shall be inadmissible; (d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible.

NOTE: Clause (a) appears consistent with our present procedure as does clause (b). Clause (c) contains the same limitation on character testimony for impeachment purposes as appears in Rule 21 in respect to a conviction of a crime. Clause (d) prohibits proof of specific instances of conduct to prove character trait for impeachment purposes. (See Rule 46, however, on manner of proof of character where the same is an issue in the case.)

## Rule 23. Privilege of Accused

(1) Every person has in any criminal action in which he is an accused a privilege not to be called as a witness and not to testify.

(2) An accused in a criminal action has a privilege to prevent his spouse from testifying in such action with respect to any confidential communication had or made between them while they were husband and wife, excepting only (a) in an action in which the accused is charged with (i) a crime involving the marriage relation, or (ii) a crime against the person or property of the other spouse or the child of either spouse, or (iii) a desertion of the other spouse or a child of either spouse, or (b) as to the communication, in an action in which the accused offers evidence of a communication between himself and his spouse; but a wife is not compelled to testify against her husband, nor a husband against his wife.

(3) An accused in a criminal action has no privilege to refuse, when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify, except that he shall not be required to give evidence against himself, as provided by Section 12, Article I, Constitution of Utah.

NOTE: Subdivision (1) of this rule conforms to the constitutional privilege against self-incrimination. Subdivision (2) modifies Sec. 78-24-8 (1) prohibiting one spouse from testifying against the other and limits the privilege to confidential communications. Subdivision (3) deals solely with privilege. It does not purport to change or affect constitutional immunities. It is supported by history, logical analysis, and the weight of authority. (See 8 Wigmore on Evidence (3rd Ed.) Sec. 2265.)

## Rule 24. Definition of Incrimination

A matter will incriminate a person within the meaning of these Rules if it constitutes, or forms an essential part of, or taken in connection with other matters disclosed, is a basis for a reasonable inference of such a violation of the laws of this State or of the United States as to subject him to liability to punishment therefor, unless he has become for any reason permanently immune from punshment for such violation.

## Rule 25. Self-Incrimination: Exceptions

Subject to Rules 23 and 37, every natural person has a privilege, which he may claim, to refuse to disclose in